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No. 80-532

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, and A. J. TAYLOR, its Secretary,

Petitioners,

v.

THE FLORIDA NURSING HOME ASSOCIATION, *et al.*,

Respondents.

AMICUS CURIAE BRIEF OF THE STATE OF ILLINOIS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The State of Illinois as *amicus curiae* respectfully joins in the Petition of the Florida Department of Health and Rehabilitative Services and A. J. Taylor, its Secretary in requesting that a writ of certiorari issue to review the judgment entered May 6, 1980 of the United States Court of Appeals for the Fifth Circuit.

QUESTION PRESENTED

Whether by agreeing to abide by federal laws and regulations applicable to the Medicaid program, Florida waived its Eleventh Amendment immunity from suit in federal court for retroactive damages sought by Medicaid providers because Florida complied with a federal regulation later declared in violation of a federal statute.

STATEMENT OF INTEREST

The State of Illinois has a direct financial and public policy interest in the outcome of this case. Through the Department of Public Aid, Illinois reimburses 800 skilled and intermediate care nursing facilities on a reasonable "cost-related" basis within the Congressional mandate of 42 U.S.C. § 1396a(a)(13)(E) of the Medicaid Act. Comprehensive state legislation has been enacted for the purpose of reimbursing such facilities. *See Ill. Rev. Stat.,* ch. 23, § 5-5.1 *et seq.* (1979). For fiscal year 1981 the Illinois General Assembly has appropriated in excess of $375,000,000 in order to make such payments.

Since its cost-related reimbursement plan has gone into effect, the State has been embroiled in almost continuous litigation concerning the validity of its reimbursement methodology. *See Unicare Health Care Facilities, Inc.* v. *Miller,* 481 F.Supp. 496 (N.D. Ill. 1979). Presently pending before the United States District Court for the Northern District of Illinois, Eastern Division are four cases challenging various aspects of the plan, some of which seek monetary relief dating back to July 1, 1976. It is clear that the State of Illinois has a vital interest in preserving its Eleventh Amendment sovereign immunity against federal suits for retroactive monetary awards as the state's liability could exceed over One Hundred Million Dollars in retroactive payments.

REASONS FOR GRANTING THE WRIT

A State does not waive its Eleventh Amendment sovereign immunity against actions for retroactive monetary relief by merely agreeing to abide by applicable regulations of the Medicaid program. The Fifth Circuit held that Florida, by contracting with nursing home operators to recognize and abide by all federal laws applicable to the Medicaid program, had "expressly waived its Eleventh Amendment immunity and consented to suit in federal court regarding any action by providers [of nursing home services] alleging a breach of these laws." *Florida Nursing Home Ass'n* v. *Page,* 616 F.2d 1355, 1363 (5th Cir. 1980). The court reasoned that a contrary holding would produce an "inequitable result" because the nursing homes had provided services from July 1, 1976 for which they would not be fully compensated. *Id.* The State of Illinois contends that the court, by finding waiver of Florida's sovereign immunity, has *sua sponte* created a bluntly indiscriminate and destructive weapon which can be used to dismantle the Eleventh Amendment and which will effectively eviscerate this Court's decision in *Edelman* v. *Jordan,* 415 U.S. 651 (1974).

In *Edelman* v. *Jordan,* this Court held that a waiver of a state's Eleventh Amendment immunity would be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " 415 U.S., at 673, *quoting Murray* v. *Wilson Distilling Co.,* 213 U.S. 151, 171 (1909). The Fifth Circuit's holding clearly disregarded this Court's pronouncement that "[t]he mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts." 415 U.S., at 673. Nor does the

fact that Florida agreed to be bound by contract to federal requirements in its administration of the Medicaid Act lend any support to the Fifth Circuit's finding of a waiver. This Court's opinion in *Edelman* drew no distinction between the manner in which a state participates in a federally funded program. Indeed, its citation of *In re Ayers,* 123 U.S. 216 (1887) and *Hagood* v. *Southern,* 117 U.S. 52 (1886), which were both actions against state officers for specific performance of a contract to which the State was a party, demonstrates that actions sounding in contract may be barred by the Eleventh Amendment. Rather, the only distinction found permissable for Eleventh Amendment purposes "was the difference between prospective relief on one hand and retrospective relief on the other." *Quern* v. *Jordan,* 440 U.S. 332, 337 (1979). As the relief sought in the instant case is "retroactive in nature", 616 F.2d at 1362, it is clearly barred by the Eleventh Amendment.

The more disturbing aspect of the Fifth Circuit's opinion is its consideration of whether a waiver of the state's sovereign immunity should be found in order to prevent reaching an "inequitable result." Specifically, the court felt that the nursing homes should be *fully* compensated for the services they had provided since July 1, 1976 on a cost-related basis. Yet, this line of reasoning that nursing home operators are entitled to state funds as a "form of compensation" is inconsistent with decisions of both this Court, *see Edelman* v. *Jordan, supra,* 415 U.S., at 668, and the United States Court of Appeals for the Seventh Circuit. In *Ford Motor Co.* v. *Department of Treasury,* 323 U.S. 459 (1945), a taxpayer, who had paid taxes to the State of Indiana under protest, sought a refund of those taxes from the Indiana state officials who were charged with their collection. The taxpayer claimed that the tax had been imposed in violation of the United States Constitution. It was perhaps "inequitable" to deny the relief sought in that case, since the taxpayer had at one time possessed the money, and paid it over to the State pursuant to an allegedly uncon-

stitutional tax. Yet this Court had no hesitation in holding that the taxpayer's action was a suit against the State and barred by the Eleventh Amendment. In *Shashoua* v. *Quern,* 612 F.2d 282 (7th Cir. 1980), a physician brought an action against the Illinois Department of Public Aid claiming, *inter alia,* that the Department's level of reimbursement for services rendered to Medicaid patients was inadequate and eventually forced him to end his practice. *Id.* at 283. Presumably, under the Fifth Circuit's line of reasoning, the Seventh Circuit should have deemed the Department's conduct "inequitable" and found a waiver of the State's sovereign immunity. Yet the court held that "[t]o the extent that the plaintiff seeks damages or any other retroactive relief against Illinois, the action is, . . ., outside the jurisdiction of the federal courts." *Id.* at 284. The real "inequity" of the Fifth Circuit's decision is that it allows Medicaid providers access to federal courts to seek retroactive monetary relief from the State, whereas Medicaid recipients are precluded from similar relief. *See Carey* v. *Quern,* 588 F.2d 230, 233 (7th Cir. 1978); *Townsend* v. *Edelman,* 518 F.2d 116, 121-22 (7th Cir. 1975); *Wilson* v. *Weaver,* 499 F.2d 155, 158 (7th Cir. 1974). The State of Illinois contends that such an anomalous distinction cannot be permitted to stand.

CONCLUSION

For the foregoing reasons, the State of Illinois respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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